United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1521

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

FRANCIS C. PLANO,

Appellant,

- against -

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1 - Madison - Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

No. 74-1527

Appellees.

BRIEF OF APPELLEE
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7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§2204. Education Law

Appointment of district superintendent 32

1. The board of cooperative educational services of a supervisory district shall meet upon the direction of the commissioner of education, at a time and place designated by the commissioner, for the purpose of appointing a district superintendent of schools for a probationary term whenever a vacancy in such office shall occur, unless the commissioner shall issue an order pursuant to section twenty-two hundred one redistricting the county so as to provide for a lesser number of supervisory districts. * * *

§2212. Education Law

Removal of district superintendent from office 32

A district superintendent may be removed from office at any time during a period of three years after the date of his appointment to such office upon the affirmative vote of a majority of the members of the board of cooperative educational services. At any time after the expiration of three years from the date of such appointment, a district superintendent may be removed from office by the commissioner of education with the concurrence of a majority of the members of the board of cooperative educational services.

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§3013. Education Law

Tenure: certain other school districts 32

1. Teachers, principals, except principals of the district, supervisors and all other members of the teaching and supervising staff, of school districts employing eight or more teachers, other than city school districts and school districts having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of not to exceed five years. Any principal of the district, however, shall be appointed by such school authorities upon the recommendation of the district superintendent of schools. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

2. On or before the expiration of the probationary term of a person appointed for such term, except the principal of the district, the district superintendent of schools shall make a written report to the board of education or trustees recommending for appointment on tenure, from lists and reports furnished by the principal of the district, those persons who have been found competent, efficient, and satisfactory. Any principal of the district, however, shall be recommended for appointment on tenure to such school authorities by the district superintendent of schools. By a majority vote the board of education or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of

the following causes, after a hearing, as provided by section three thousand twenty - a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period . * * *

§3031. Education Law 32

Procedure when tenure not to be granted at conclusion of probationary period or when services to be discontinued

Notwithstanding any other provision of this chapter and except in cities having a population of one million or more, boards of education and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

This section shall not be construed as modifying existing law with respect to the rights of

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No. 74-1527

Appellees.

BRIEF OF APPELLEE F. WRIGHT JOHNSON

STATEMENT OF ISSUES

1. Did the District Court err in dismissing the complaint for failure to exhaust administrative remedies?

2. Is this a proper matter for the review of the New York State Commissioner of Education?

3. Is Plano barred from appealing to the Commissioner of Education because of his failure to file a notice of appeal with the Commissioner within thirty days after his dismissal?

4. Does Plano have a property interest in preserving his occupational and employment status?

5. Was plaintiff's motion for a preliminary injunction and temporary restraining order properly denied?

6. Is Johnson, who has no power to dismiss teachers, properly a defendant in this matter?

7. Should Plano, who has commenced a grievance proceeding pursuant to the terms of the contract between the teachers union and the school, be required to exhaust that remedy?

STATEMENT OF THE CASE

Francis C. Plano, the plaintiff herein, was a probationary English teacher at Westmoreland Central School, having been appointed July 1, 1972. (15a)

On September 24, 1973, the plaintiff assigned as homework for his tenth and eleventh grade students the task of writing an essay on the topic "Pre-Marital Sex." Although Plano asserts that he submitted the homework assignment in question to his building principal for his approval, the building principal, by affidavit stated:

> "3. That your deponent has an administrative policy which requires High School teachers to submit to him weekly lesson plans. The purpose of this policy is two fold:
>
> (a) In the event that a substitute teacher is called for, he will be able to show such plan to the substitute teacher;
>
> (b) In the event that your deponent determines to monitor a class, he can read the lesson plan in advance of that class and have knowledge of what is to transpire.
>
> 4. That it is not your deponent's policy to read all lesson plans of all teachers for the purpose of approving content, and in point of fact, your deponent did not read the 10th-grade English assignment assigned by Francis C. Plano, a teacher in the Westmoreland Central School System prior to September 26, 1973, nor did he ever approve the same." (166a, 167a)

On or about September 26, 1973, the plaintiff had conferences regarding said assignment and other matters which his building principal and subsequently defendant Supervising Principal Baker.

Defendant Melie, Clerk of the Board of Education and defendant Baker, signed a form entitled "Request to the District Superintendent of Schools that Probationary Period be Terminated" on September 27, 1973, whereby said defendants expressed their opinion to the defendant, F. Wright Johnson, District Superintendent of Schools, that the probationary period of the plaintiff be terminated as of November 1, 1973. (104 a)

The form used by the said defendants was obsolete and had been so for almost three years. Approximately two and one-half to three years ago, defendant F. Wright Johnson, as District Superintendent of Schools, distributed to all school districts under his jurisdiction a new request form bearing the same title. The new form is distinguishable from the old in that there is provision only for the opinion of the chief school administrator.

Defendant Baker, plaintiff's supervising principal, deposed the following information regarding his dealings with Plano:

> "3. On May 22, 1973, the Plaintiff presented a letter to me offering his services as advisor to the School newspaper but only under the condition 'that the regular school budget finance the newspaper and all necessary functions related to its publication' (see Exhibit 1 attached hereto).

Plaintiff was advised by me that it was not possible for the taxpayers to finance the School newspaper. At the next public meeting of the Board of Education, plaintiff persisted and was advised by the Board of Education, that this financing was not possible. Thereafter, a petition in which the plaintiff was involved was filed with the Board of Education, which petition persisted in asking for financial support from the taxpayers for the School newspaper. At this time, I had a complaint from the Vice President of the Student Council as follows: 'Mr. Plano is giving me a hard time because I won't support his request for funds' for the student newspaper.

4. On June 12, 1973, I, while eating lunch in the School cafeteria, asked the Plaintiff to come to my office for a personal conference during a free period that afternoon or after school. Plaintiff stated flatly that he would not go to my office and insisted before a number of persons eating in the cafeteria to be told then and there why I wanted to see him. Although I attempted to make clear that the matter was personal, the Plaintiff persisted in demanding that the matter be discussed then and there. I then did state to the Plaintiff my reason for requesting the conference (to advise that plaintiff would not be recommended as advisor to the newspaper), and Plaintiff thereupon became belligerent and boisterous.

5. During the 1973 summer recess, on the first day of work in the Westmoreland Central School District for a newly hired High School Principal, the Plaintiff came to this Principal's office asking for $250.00 to fund a summer writing project, of which no one on the Board or in the Administration (including Plaintiff's Department Chairman whom the Plaintiff knew full well must give prior approval and who was in fact the proper person to make any such request of the Administration and Board) had any knowledge.

6. On September 25, 1973, Plaintiff assigned the writing of a composition on the topic "Premarital Sex" to his English students, a group consisting of 20 sophomores, 10 juniors and 1 senior, ranging in age from 14 years upwards. Parental reaction by way of complaints to me were immediate and numerous. Plaintiff totally failed to cooperate with me in connection with discussing the problem which had arisen because of these complaints.

7. Students complained to me that the plaintiff was swearing in class. Plaintiff received a verbal reprimand from the High School Principal." (205a - 207a)

Upon receipt of the obsolete request form signed by the defendants Melie and Baker, defendant F. Wright Johnson, considered same as a request from the chief school administrator, and not in any way from the Board of Education of defendant Westmoreland School. The said defendant never discussed his subsequent recommendation for termination with any member of the defendant Board of Education and in fact never considered the request form submitted to him, anything but an opinion expressed by a chief school administrator. (63a - 66a)

Defendant, F. Wright Johnson, on October 2, 1973, recommended to the defendant Board of Education that plaintiff's probationary period be terminated. (63a - 66a)

On October 3, 1973, the plaintiff was notified by the defendant Melie of such recommendation and by letter dated October 9, 1973 he requested that said defendant Melie give reasons for the recommendation of termination. (20a) By letter dated October 16, 1973, defendants Baker and Johnson explained their reasons for the

recommendation of termination of the services of the plaintiff:

> "1. You have been demanding of and uncooperative with the school administration.
>
> 2. You have shown poor judgment in your choice of subjects for assignments and classroom discussion.
>
> 3. Efforts on the part of the school administrators to correct your deficiencies through discussions with you have been unsuccessful." (21a)

Plaintiff Plano responded by letter of October 24, 1973 wherein he assumed without basis that he would have the opportunity to address the Board of Education and further requested that said address to the Board be in private executive session. (22a)

Subsequently on November 1, 1973, the plaintiff prepared an open letter to the Board of Education which was apparently distributed to some members of the Board of Education but not all of them. (23a - 29a)

Plaintiff at no time alleges or contends that any request for hearing was made to the defendant F. Wright Johnson, or was said open letter ever distributed to him.

Defendants Romeo, Acee, Barns, Nowak, Plehn and Richards, members of the Westmoreland Board of Education, by affidavit, denied Plano's allegations that the Board, on October 30, discussed the rumor that Plano had dated a 9th grade girl, and further denied that this or any other rumor was a factor in determining their vote regarding Plano's dismissal. (149a - 165a)

On November 2, 1973, the Board of Education of the Westmoreland Central School District by a vote of five to two voted to terminate the probationary period of the plaintiff effective December 7, 1973 and he was so notified on November 5, 1973. (30a)

Defendants Acee, Barns, Nowak, Plehn, Richards and Romeo, members of the Board of Education, by affidavit stated that the factors they considered in dismissing Plano were:

> "(a) On May 22, 1973, the Plaintiff presented a letter to the Supervising Principal offering his services as advisor to the School newspaper but only under the condition 'that the regular school budget finance the newspaper and all necessary functions related to its publication.' Plaintiff was advised by the Supervising Principal that it was not possible for the taxpayers to finance the School newspaper. At the next public meeting of the Board of Education, Plaintiff persisted and was advised by the Board of Education that this financing was not possible. Thereafter, a petition in which the Plaintiff was involved was filed with the Board of Education, which petition persisted in asking for financial support from the taxpayers for the School newspaper. At this time, the Supervising Principal had a complaint from the Vice President of the Student Council as follows: 'Mr. Plano is giving me a hard time because I won't support his request for funds' for the student newspaper.
>
> (b) On June 12, 1973, the Supervising Principal, while eating lunch in the School cafeteria, asked the Plaintiff to come to his office for a personal conference during a free period that afternoon or after school. Plaintiff stated flatly

that he would not go to the Supervising Principal's office and insisted before a number of persons eating in the cafeteria to be told then and there why the Supervising Principal wanted to see him. Although the Supervising Principal attempted to make clear that the matter was personal, the Plaintiff persisted in demanding that the matter be discussed then and there. The Supervising Principal then did state to the Plaintiff his reason for requesting the conference (to advise that Plaintiff would not be recommended as advisor to the newspaper), and Plaintiff thereupon became belligerent and boisterous.

(c) During the 1973 summer recess, on the first day of work in the Westmoreland Central School District for a newly hired High School Principal, the Plaintiff came to this Principal's office asking for $250.00 to fund a summer writing project, of which no one on the Board or in the Administration (including Plaintiff's Department Chairman whom the Plaintiff knew full well must give prior approval and who was in fact the proper person to make any such request of the Administration and Board) had any knowledge.

(d) On September 25, 1973, Plaintiff assigned the writing of a composition on the topic of "Premarital Sex" to his English students, a group consisting of 20 sophomores, 10 juniors and 1 senior, ranging in age from 14 years upwards. Parental reaction by way of complaints to the Supervising Principal and members of the Board of Education were immediate and numerous. Plaintiff totally failed to cooperate with the Supervising Principal in connection with discussing the problem which had arisen because of these complaints.

(e) Students complained to the Supervising Principal that the Plaintiff was swearing in class. Plaintiff received a verbal reprimand from the High School Principal." (210a, 211a)

Plaintiff is a person covered by an agreement between the Supervising Principal of Westmoreland Central School and the Westmoreland Central School Teachers Association for 1972-1974 and has, pursuant to the appropriate articles of said agreement, instituted a grievance proceeding relative to his termination. That grievance is still pending.

Appellant brought on a motion for a temporary restraining order and a preliminary injunction, to restrain and enjoin defendants from terminating Plano and to reinstate him pending the determination of this matter before the United States District Court for the Northern District of New York, Judge James T. Foley, presiding, on January 21, 1974 (36a, 37a). By Memorandum-Decision and Order, dated February 15, 1974, Judge Foley granted appellees' motions for dismissal of appellant's complaint, and denied and dismissed appellant Plano's motion for a temporary restraining order and preliminary injunction. (291a)

On February 28, 1974, appellant filed a motion for reconsideration and amendment of the decision, order and judgment of February 15, 1974, noticed to be heard on March 18, 1974. This motion was denied by Judge Foley by order dated March 18, 1974. (30a)

It is from the decision, order and judgment of February 15, 1974, denying appellant's motion for a temporary restraining order and preliminary injunction and dismissing appellant's complaint;

and the order of March 18, 1974 denying appellant's motion for reconsideration and amendment from which appellant Plano appeals. (341a)

POINT I

APPELLANT HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

In what petitioner concedes is controlling law in New York State, this court held that a petitioner must exhaust his administrative remedies:

> "When a complaint alleged that a subordinate state officer had violated the plaintiff's constitutional rights by acting because of bias or other inadmissible reasons, by distorting or ignoring the facts, or by failing to apply a constitutional state standard, and the state has provided for a speedy appeal to a higher administrative office." Eisen v. Eastman, 421 F 2d 560 (1969) at page 569.

Eisen, a landlord, brought an action against the City of New York District Rent and Rehabilitation Director asserting that the Director violated his constitutional right to not be deprived of property without due process of law by reducing the rents to which Eisen was restricted under the city's rent and rehabilitation law. The court distinguished Eisen from McNeese v. Board of Education 373 U.S. 668, 83 S. Ct. 1433, 106 Ed 2d 622 (1963), a desegregation case, by pointing out that the Supreme Court in McNeese predicated their decision that petitioner's need not exhaust remedies set forth by Illinois law by showing that the administrative remedies established by the State would not provide

the petitioner with a certain and positive judgment. The Illinois statute provided that "if 500 of the residents of a school district or 10%, whichever was less, could file a complaint with the Superintendent of Public Institutions alleging racial segregation." at page 568. The superintendent would then hold a hearing and if he decided that the allegations were "substantially correct," he would then request the Illinois Attorney General to bring suit. The court of appeals pointed out that "the bulk of the opinion (McNeese) was devoted to demonstrating that this did not qualify as an effective administrative remedy." at page 568 (parenthesis added).

In the case at bar, Section 310 of the Education Law provides a clear and speedy source of appeal of the defendant school board's termination of the appellant's services.

> "Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

The decision by the defendant school board is interlocutory. Section 310 provides petitioner with a speedy appeal process to a higher administrative officer. The commissioner of education is empowered by the statute to make final judgment as to the retention or dismissal of the petitioner. He is disinterested in the outcome having had no prior participation in any of the incidents described in the statement of facts. (supra).

In James v. Board of Education, 461 F 2d, 566 (1972), this court held that plaintiff's complaint under 42 USCA 1983 was properly heard by the court where the plaintiff teacher had first appealed his dismissal to the commissioner of education. James alleged that he had been dismissed because he wore a black arm band while teaching class as a protest against the Viet Nam war. The record did not indicate that any comment about the arm band was made by the teacher in class. Following his dismissal by the school board the teacher appealed to the commissioner of education but did not submit an argument and the school board was upheld. This court found that James exhausted his administrative remedies and further found that his First Amendment rights were violated.

James clearly differs from the case at bar as Plano was not dismissed as a result of any opinion which he expressed in the classroom. Plano's dismissal was the result of a series of occurrences and conflicts with other employees and students as sworn to by the Supervising Principal Baker, and the Board of

Education. (Statement of case supra). In addition, in the case at bar, Plano has not sought an appeal to the commissioner of education.

In David v. New York, 341 F Supp. 944 (1972) (S.D. NY) the court held that where an individual was seeking to enjoin the New York Telephone Company from demanding alleged discriminatory deposits based upon employment status, plaintiff should seek to avail himself of the statutory procedures providing a"comprehensive scheme of administrative remedies with respect to the regulation of telephone rates and deposit tariffs which are within the jurisdiction of the New York Public Service Commission"(at page 947).

The court further stated:

> "Having failed to avail himself of the ample state remedies available to him, the plaintiff, cannot invoke the Civil Rights Act, 28 USC 1343 (3) . . . " at page 947.

Where petitioner, a teacher, asserted federal jurisdiction based upon the Civil Rights Act, 42 U.S.C.A. Section 1983 with jurisdiction conferred by Section 1343 of Title 28 of the U.S. Code, alleging a conspiracy to deprive her of receiving a certificate as a permanent teacher thereby depriving her of the right to teach in the Jersey City School System, the court held that she was not entitled to maintain an action in the federal court under the Civil Rights Act until she exhausted her administrative remedies. Baron v. O'Sullivan, 258 F 2d 336 CA 3rd Circuit (1958).

The court emphasized that by statute in the State of New Jersey a final decision as to the petitioner's retention would not be reached until the commissioner of education rendered a decision on the controversy. An appeal of the commissioner's decision could have been taken to the state board which makes the final decision. The court viewed the decision by the local district a tentative decision, not finalized until the controversy was reviewed by the commissioner of education and the state board.

> "Although the usual reason for the requirement of exhaustion of administrative remedies is the hesitation of the courts to interfere with state legislative process, there is a more compelling one, as is apparent here. Appellant alleges a denial of a federally protected privilege. The decision of the Board of Examiners of Jersey City, reviewable as it is both by the commissioner and the state board, is in a true sense interlocutory. It merely is a tentative determination subject to revision at the discretion of other agencies which are an integral part of the same legislative scheme. We cannot know, therefore, whether the privilege asserted has been denied until the state board has finally made its decision. The present action was premature." at page 338.

At no time has petitioner indicated any defect in the appellate process set forth by New York Statutory Law. Defendant Johnson respectfully submits that the failure of the petitioner to exhaust his administrative remedies should cause this court to dismiss this action.

POINT II

AN APPEAL TO THE COMMISSIONER OF EDUCATION IS ESSENTIAL IF PETITIONER IS TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND THE CASE AT BAR IS A PROPER MATTER FOR CONSIDERATION BY THE COMMISSIONER.

Article 7 of the New York State Education Law, Section 305 (1) and (2), and Section 310 of the same, clearly delineate the powers and responsibilities of the commissioner of education. Sub-sections (1) and (2) of Section 305 set forth the general duties of the commissioner of education as follows:

> "1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined by the board of regents.
>
> 2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control."

Section 310 of the Education Law delineates the type and manner of general supervision to be exercised by the commissioner of education as chief executive officer of the state school system to include petitions from:

> "Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:
>
> * * *
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

The commissioner of education clearly has broad administrative and quasi judicial powers over the day to day functions of the public school system, including the hiring, and firing of teaching personnel. Section 310 (7) of the Education Law provides a clear and speedy appellate procedure for an aggrieved employee of a public school system. The rules of the commissioner of education provide for an oral and written presentation to be made to the commissioner regarding the facts surrounding the matter in question. This procees is not dissimilar to appellate pleading in state and federal courts. There is, however, one significant distinction. The commissioner of education, apart from his quasi judicial obligations, is also the chief administrator of the state's public school system. He is charged with broad based responsibilities and obligations by Section 305 of the Education

Law. Any dispute between an employee of the public school system and the board of education should first be presented to the chief executive officer of the state's public school system. If the matter is not resolved at that level to the satisfaction of the parties, the courts are the next recourse.

The dichotomy between the judicial function and administrative is noted in the Matter of Board of Education v. Nyquist, 21 Misc. 2d 903 (1966). The court upheld the commissioner of education's power to determine boundary lines between two or more school districts when said lines are in dispute. The petitioner argued that the commissioner of education substituted his judgment for the judgment of the superintendent of schools in determining the boundary lines in dimensions different from the district superintendent's boundaries. The court noted that:

> "In appraising the judicial nature of the act of the commissioner of education, it must be remembered that he combines both judicial and administrative functions." at page 906.

The court went on to note that for this reason, the commissioner of education overturned a ruling of the superintendent of schools.

The Court of Appeals, in the often cited case of People Ex. Rel. Bd. of Education v. Finley, 211 NY 51 (1914), held that the commissioner of education was empowered by Section 310 of the Education Law to hear an appeal regarding the eligibility of certain persons to be placed on a civil service list for teaching

positions the Court stated:

> "By our state system of education protected by the constitution and developed by much study and experience, the commissioner of education is made the practical administrative head of the system, and in the exercise of sound wisdom, as we believe, the legislature has deemed it best to make him the final authority in passing on many questions bound to arise in the administration of the school system, and has provided an expenditious and simple method by which a disposition of such questions could be reached through appeal to him." at page 57.

The court, in refusing petitioner's motion for a writ of prohibition against the appeal which was based upon the assertion that irregardless of the commissioner's findings, the matters involved might be taken to the courts, stated:

> "Moreover, we are not prepared to concede that this appeal will be so utterly futile as is claimed by the appellant. It is not to be assumed that the commissioner of education will lightly or erroneously decide the complicated questions of school administration which will be presented to him, but we are entirely justified in presuming that he will consider them deliberately and carefully and that his decision will command respect and carry much influence." at page 59.

In the Matter of Board of Education of New York v. Allen, 6 NY 2d 127 (1959), the Court upheld the commissioner's order to reinstate several teachers who were dismissed because they would not answer questions about other teachers having communist ties. The court quoted the commissioner of education who stated that the problem:

> " . . . affects the administration of our entire education system." at page 136.

In upholding the findings of the commissioner in what was clearly a civil rights-freedom of speech matter, the court stated that:

> "Section 310 (of the Education Law) was intended to confer a wide sweep of power upon the commissioner." at page 137.

The court went on to say:

> "The constitution has made the commissioner of education the administrative head of the state system of education and he has been given final authority in passing on the numerous questions bound to arise in the administration of the school system. The question of whether the respondent employees could be suspended or discharged for failing to inform as to particular conduct of fellow teachers was one within his jurisdiction since it is obviously related to the administration of the school system." at page 138.

This court had no apparent difficulty reviewing the judgment of the commissioner in James v. Board of Education, 461 F 2d 566 (1972), where the petitioner's dismissal by the board of education was affirmed by the commissioner of education after a hearing.

Unlike Goetz v. Ansell, 477 2nd 636, (1973), the commissioner has not ruled on a fact situation similar to the case at bar.

A failure to compel the petitioner to exhaust his administrative remedies would subvert the statutory responsibilities of the commissioner of education.

POINT III

ALTHOUGH APPELLANT HAS NOT FILED AN APPEAL WITH THE COMMISSIONER OF EDUCATION WITHIN THIRTY DAYS, THE COMMISSIONER MAY IN HIS DISCRETION WAIVE THE TIME LIMIT AND EXCUSE SUCH A FAILURE TO PURSUE THE APPEAL UPON SHOWING OF GOOD CAUSE

Rule 275.16 of the Rules of the Commissioner of Education states:

> "An appeal to the commissioner must be instituted within thirty (30) days from the making of the decision or the performance of the act complained of. The commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition."

The discretionary power of the commissioner of education to hear appeals after the thirty (30) day time limit is well established by the courts of New York State. In the Matter of Board of Education v. Nyquist, 60 Misc. 2d 967 (1969), the court upheld the commissioner's right to hear disputes filed with the commissioner after thirty (30) days had lapsed from the time of the action complained of. The Board of Education maintained that the appeal was not instituted within thirty (30) days after a teacher's last pay period and prior to her retirement. The court stated:

> "Furthermore, the thirty (30) day rule is a rule of practice and can, in an appropriate case, be waived by the commissioner." supra at page 972.

Where an appeal to the commissioner was not commenced within thirty (30) days after the action complained of, the commissioner of education stated in his decision upholding the right of the petitioner to appeal to him that:

> "Finally, the respondent argues that this appeal is barred by laches under article 275.16 of the regulations of the commissioner. The commissioner in his discretion may excuse a failure to commence a timely appeal pursuant to Section 275.16." In the Matter of Fineburg, 10 Education Department Reports, 12 at page 13.

Since the question of permitting the appeal in the case at bar is subject to the discretion of the commissioner of education, the matter of the thirty (30) day limitation under article 275.16 of the regulations of the commissioner is not relevant to this court's deliberation at this time.

POINT IV

APPELLANT DOES NOT HAVE A PROPERTY INTEREST IN PRESERVING HIS OCCUPATIONAL AND EMPLOYMENT STATUS

Appellant was hired on July 1, 1972 by the Westmoreland Board of Education for a probationary period of five years. Appellant or any other teacher hired in a public school system of New York State is not guaranteed employment by the school district for a five year period. Rather the five year period signifies the maximum period of time that will elapse between the probationary appointment and a recommendation by the Superintendent and decision by the Board of Education as to tenure.

Section 3013 of the Education Law of New York State quite precisely excludes any illusion that a probationary teacher has a five year contract:

> "Services of a person so appointed to any such positions (teachers, principals and all other members of the teaching and supervising staff) may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority of the board of education or trustees." (parenthesis added) (emphasis added)

Upon entering into his employment contract, petitioner, by virtue of this statute, was fully aware that the contract was terminable at will during his five year probationary period. It is clear that upon the granting of tenure, a teacher does obtain a property right, can properly expect to continue in the employ

of the school district, and is entitled to due process should there be a recommendation that the tenured teacher be removed from his position. Once granted tenure, a teacher may not be removed:

> " . . . except for any of the following causes, after a hearing, as provided by section three thousand twenty - a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability or neglect of duty." 3013 (2) Education Law.

In Board of Regents v. Roth, U.S. 564, L Ed 2d, 548, petitioner, a college professor, hired for the first time under a one year contract, was not rehired by the State University, and was given no reason for non-retention, in conformity with rules promulgated by the Board of Regents of the State of Wisconsin. The teacher was given no opportunity to challenge the decision at any form of a hearing. The teacher brought an action in Federal Court alleging that the decision not to rehire him for the next year was an infringement upon his Fourteenth Amendment rights and further alleged that the true reason for his termination was to punish him for making critical comments about the university administration. He maintained that the failure of university officials to give him notice of any reason for non-retention and an opportunity for a hearing violated his right to procedural due process of law.

In holding that the petitioner's dismissal was proper and not in violation of the First and Fourteenth Amendments, the court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (page 577)

The court continued:

> " . . . so the respondents' property interest in employment at Wisconsin State University - Oahkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969 but the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.
>
> Thus, the terms of the respondents appointment secured absolutely no interest in employment next year. Nor, significantly, was there any state statute or university rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment." (page 578)

Rule II and Rule III of the Wisconsin Board of Regents provided that the contracts of teachers which were not renewed

four consecutive times could be terminated at the end of the year without a hearing, and that the same class of teachers could be dismissed during a term without a hearing. Regents v. Roth at page 567.

The similarities between Roth and the case at bar are clear. In each instance, the teacher has the conditions of his employment clearly defined and is fully aware that this appointment is conditional and can be cancelled at any time until tenure is granted. Furthermore, in each instance the time for the probationary period of the teacher is definite and certain.

In Perry v. Sinderman, 408 U.S. 593 (1972), respondent was employed by the Texas state college system for ten years as a teacher on one year contracts and since the State of Texas did not have a formal system of tenure, failure to renew respondent's contract without explanation or a hearing after his outspoken criticism of the university administration was violative of the First and Fourteenth Amendments since he had been retained for ten years. The only specific mention of tenure was in the faculty guide which stated:

> "Teacher tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." (at page 579)

The court stated in Perry at page 581:

> "We disagree with the Court of Appeals insofar as it is held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F 2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."

The case at bar is clearly distinguished from Perry in that Section 3013 clearly dispels any expectancy a probationary teacher might have as to his retention and clearly indicates that the policy in New York State educational institutions is to leave the decision as to the retention of probationary teachers in the hands of the Board of Educations of the various school districts.

POINT V

APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER SHOULD BE DENIED

In reversing the lower court's granting of a preliminary injunction to a landlord in an action to compel payment of rent, the United States Court of Appeals stated in Dorfman v. Boozer, 414 F 2d, 1168 (1969):

> "The power to issue a preliminary injunction, especially a mandatory one, should be 'sparingly exercised,' 7 J.W. Moore, Federal Practice 65.04 (1) p. 1627 (2d ed 1968); O Maley v. Chrysler Corp., 7 cir., 160 Fed 35 (1947)"

The court went on to state that:

> "Before issuing such an injunction, the court must balance the damage to both parties," Embassy Dairy v. Cavalier 93 US App D.C. 364, 367,211, F 2d 43 (1954). Thus, even where denial of a preliminary injunction will harm the plaintiff, the injunction should not be issued where it would work a great and potentially irreparable harm to the party enjoined . . . unless an overwhelming case in the plaintiff's favor is present on the merits and equities of the controversy." (page 1173)

In the case at bar, affidavits annexed to the defendant's Answer signed by the principal of the Westmoreland School and six members of the Westmoreland Central School Board indicate that in their opinion, the reinstatement of plaintiff temporarily would cause disruption and interfere with the educational process at the

school involved. In addition, the students in the classes formerly taught by petitioner now have a regular instructor. To replace him and return the plaintiff to the classroom would greatly harm the continuity of the learning process of the students.

Where the court denied the motion of a teacher for a preliminary injunction directing reinstatement, the court reasoned that, because there was substantial, if not overwhelming, evidentiary support for dismissal, the teacher failed to meet the burden of establishing the likelihood of success. Canty v. Bd., 312 F Supp 254 (1970). In Canty, the court stated:

> "The court's exercise of discretion usually turns on four factors:
>
> (1) the probability of success on the merits; (2) the immediate and irreparable harm to the plaintiff if the preliminary injunction is denied; (3) the injury to defendant if the preliminary injunction is granted; and if applicable, (4) the effect the decision will have on the public." (page 255)

The court, in deciding to deny the motion said:

> "Were we to weigh the potential harm to both sides, however, it is far from clear that the scale would tip in plaintiff's favor Plaintiff claims a denial of federal constitutional rights and this has often been held to establish automatically immediate and irreparable harm. This is offset, however, by the potential harm to defendant and to plaintiff's pupils if we were to reinstate the plaintiff pending the outcome of this action. The equitable balance leans even further in defendants favor when we consider that plaintiff is seeking mandatory relief on this motion, almost identical with the

> ultimate relief he would obtain if he were to prove his case on the merits, namely, reinstatement and back pay. Finally, plaintiff, if he does eventually succeed in establishing his claim will be re-instated and obtain money damages reflecting his entire loss of earnings and thus is not irreparably injured, at least in a professional and financial sense, by a denial of this motion." (page 257)

In the case at bar, petitioner has not demonstrated the probability of success on the merits, he has unconvincingly shown immediate and irreparable harm if not re-instated. Should a permanent injunction be granted, re-instating petitioner, he will not be irreparably harmed in either his professional status or financially, and great harm will be suffered by the defendant public school system as plaintiff's interim teaching will be disruptive to the educational process at Westmoreland and very much against the public interest.

In addition, plaintiff has requested by way of a temporary restraining order and permanent injunction the same relief he seeks by way of his complaint, this before any evidentiary hearings or proof of his case on the merits.

POINT VI

THE FINAL POWER TO DISMISS APPELLANT RESTS WITH THE BOARD OF EDUCATION AND NOT WITH DEFENDANT JOHNSON, WHO AS SUPERINTENDENT IS NOT THE AGENT OF THE WESTMORELAND SCHOOL BOARD

The dismissal of the plaintiff in the case at bar was not finally and ultimately the decision of the Superintendent of Schools, F. Wright Johnson. The Westmoreland School Board, under the powers granted it by Section 3013 and 3031 of the Education Law made the final decision to terminate petitioner's employment.

Petitioner Johnson was appointed to serve as Superintendent pursuant to Section 2204 of the Education Law, which grants the power to appoint a superintendent of a supervisory district to the district's Board of Cooperative Educational Services, a completely different, separate and distinct body from the Westmoreland Board of Education. The power to dismiss defendant Johnson from his position as Superintendent of Schools rests with the Commissioner of Education with the concurrence of a majority of the Board pursuant to Section 2212 of the Education Law.

Seavey on Agency, 1964 West Publishing Company, defines an agent as follows:

> "The right of the principal to direct what the agent shall do or shall not do is basic. It is a violation of duty for the agent to act for the principal in a manner contrary to orders and he has a

> duty to obey all orders which are within his contractual undertaking. It is this which distinguishes a nonagency trust from a trust in which the 'trustee' is also an agent. In determining the existence of a master servant relation, the existence of a right to control the physical conduct of the agent is normally the most important element . . . " page 5.

An agent is a person authorized by another to act on his account or under his control. Wasilowski v. Park Bridge Corp., 156 F 2d 612. An agent is one who acts for one in the place of another by authority from him. NY Jur. Vol. 2 at page 195. The consent of both the principal and the agent is necessary to create an agency.

It is clear that the defendant Board of Education had no control over the actions of defendant Johnson and that likewise ohnson has no control over the Board's actions. The statutory powers of F. Wright Johnson as District Superintendent cannot be subject to the Westmoreland School Board's control. Because the power to dismiss a teacher does not reside with defendant Johnson in his position as Superintendent of Schools and because he is not an agent of the School Board, he is not a proper party to this action and the complaint as against him should be dismissed.

CONCLUSION

Without exhausting his administrative remedies, the Appellant Plano has no standing in this Court. This issue may very well be conclusively decided by a decision of the Commissioner of Education who is empowered to reinstate the Appellant or to continue his termination in his discretion.

The decision of the District Court should be affirmed.

Respectfully submitted,

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